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No. 89-1331

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DENNIS GWIRTZ, *et al.*,
Petitioners,
v.
OHIO EDUCATION ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred when it concluded, based on the factual findings of the District Court, that the notice sent to nonmember employees prior to the collection of fair share (*i.e.*, agency) fees—which included supplemental schedules of chargeable and nonchargeable expenditures for respondent Ohio Education Association and its affiliated parent organization, the National Education Association, that were independently audited by certified public accounting firms—satisfied the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to "verification by an independent auditor."

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ohio Education Association submits that the Petition for a Writ of Certiorari should be denied, and files this brief in opposition to the Petition.

STATEMENT OF THE CASE

A. *The Background Facts.* Petitioners are teachers in one of two public school districts in Ohio. In both of these school districts, a local education association ("local association") that is affiliated with the Ohio Education Association ("OEA") at the state level and the National Education Association ("NEA") at the national level is recognized as the exclusive representative for a bargaining unit consisting of all teachers in the district. Although petitioners are members of those bargaining units, they chose not to join their respective local associations during the 1987-88 school year.

In their capacity as exclusive representatives, the local associations entered into collective bargaining agreements with their respective school districts that covered the 1987-88 school year. As permitted by Ohio law—specifically, Ohio Rev. Code § 4117.09(C), *reprinted in* Appendix to Petition ("App.") at 23a—each of those collective bargaining agreements contained a provision requiring employees within the bargaining unit who were not members of the exclusive representative to pay a fair share fee for services rendered by the exclusive representative and its affiliated organizations. Pursuant to these provisions, the local associations charged petitioners with a fair share fee for the 1987-88 school year.

To collect those fair share fees, both local associations followed a procedure that was adopted by OEA to govern fee collections from all nonmember employees in Ohio who were covered by a fair share fee agreement involving one of OEA's affiliated local associations. As the first step in that procedure, OEA mailed a notice to all nonmember employees on December 15, 1987. Because the Questions Presented by the Petition for a Writ of Certiorari concern the adequacy of the financial information that was provided in the December 15 notice, we describe in some detail the relevant documents that were included in that notice.[1]

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[1] Although not directly relevant to the issue in this case, it bears noting that the notice that OEA sent to nonmember employees included several documents other than the financial documents described in text. In particular, the notice contained a cover memorandum setting forth the amount of the fair share fee that the associations intended to charge to objecting nonmember employees, which was based on a determination that 97.6% of the OEA portion of the fair share fee and 78.9% of the NEA portion of the fair share fee would be expended on legally chargeable activities. *See* Plaintiffs' Exhibit 2 at 1-4. This cover memorandum also explained how OEA calculated its percentage of chargeable activities, including a lengthy list of the types of expenditures that OEA determined to be both chargeable and nonchargeable to objecting nonmember employees. In addition, attached to this cover memorandum was

With regard to OEA's portion of the fair share fee, the December 15 notice to nonmember employees included two documents describing the expenditures of OEA. The first document was OEA's Program Budget for 1987-88, which provided nonmember employees with a function-by-function breakdown of OEA activities and listed the expenditures associated with each of those activities. *See* Plaintiffs' Exhibit 2 at 14-55. The second document contained the audited financial statements of OEA, and consisted of two parts: (1) OEA's basic financial statements and accompanying notes for the fiscal year ending August 31, 1987, including a Balance Sheet setting forth Assets and Liabilities, a Statement of Revenue and Expenses, and a Statement of Changes in Financial Position, App. at 26a-35a; and (2) OEA's Supplemental Schedule of Agency Fee Chargeable, Non-Chargeable, and Reasonably in Dispute Expenditures for the Year Ended August 31, 1987, with accompanying notes, App. at 36a-42a. This Supplemental Schedule provided each nonmember employee with a breakdown of OEA's chargeable and nonchargeable expenditures by program and administrative area, App. at 36a, and the accompanying notes described each area and set forth the criteria that OEA used to allocate its expenditures among legally chargeable and legally nonchargeable expenditures, App. at 37a-42a.

Both OEA's basic financial statements and its Supplemental Schedule were subjected to independent audits by the certified public accounting firm of Deloitte Haskins

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a copy of OEA's Fair Share Fee Advance Reduction Procedure, which explained, among other things, exactly what a nonmember was required to do in order to file a timely objection to the amount of the fee. *See* Plaintiffs' Exhibit 2 at 5-7. This document specifically set forth the deadline for filing a timely objection, the place where the objection had to be filed, and the fact that the nonmember could simply state a general objection to the amount of the fee without specifying any reason for his or her objection and without identifying any particular expenditure to which he or she objected.

& Sells. Based on those audits, the accounting firm authored an auditor's opinion letter that also was distributed to nonmember employees as a cover sheet to these financial documents. App. at 24a-25a. That opinion letter read as follows (emphasis added):

> We have examined the balance sheets of Ohio Education Association as of August 31, 1987 and 1986 and the related statements of revenue, expenses, and changes in cumulative excess of revenue over expenses and of changes in financial position for the years then ended. Our examinations were made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> In our opinion, the accompanying financial statements present fairly the financial position of Ohio Education Association at August 31, 1987 and 1986 and the results of its operations and the changes in its financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.
>
> Our examinations were made for the purpose of forming an opinion on the basic financial statements taken as a whole. *The supplemental schedule of agency fee chargeable, non-chargeable, and reasonably in dispute expenditures for the year ended August 31, 1987 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such supplemental schedule has been subjected to the auditing procedures applied in the examination of the basic financial statements and, in our opinion, is fairly stated in all material respects when considered in relation to the basic financial statements taken as a whole.*

As the italicized portion of this opinion letter indicates, the Supplemental Schedule setting forth chargeable and nonchargeable expenditures was separately audited by the accountants at Deloitte Haskins & Sells, and in their

opinion, was "fairly stated in all material respects when considered in relation to the basic financial statements taken as a whole." [2]

The December 15 notice also included two documents that explained NEA's determination that 78.9% of its portion of the 1987-88 fair share fee was expended on activities that were legally chargeable to objecting nonmember employees. The first document—entitled "How NEA Calculates Its Agency Fee Chargeable/Nonchargeable Expenditures"—set forth the criteria that NEA used to determine chargeable and nonchargeable expenditures and provided each nonmember employee with a breakdown of chargeable and nonchargeable expenditures by program and administrative area. *See* Plaintiffs' Exhibit 2 at 70-82. The second document contained NEA's financial statements for the fiscal year ending August 31, 1987. Much like the financial statements regarding OEA, these materials included NEA's basic financial statements and a Supplemental Schedule of Agency Fee Chargeable and Nonchargeable Expenditures, all of which were audited by the certified public accounting firm of Coopers & Lybrand. *See* Plaintiffs' Exhibit 2 at 83-112. The results of these audits were set forth in two auditors' opinion letters that were included in the notice, one for NEA's basic financial statements and the other for NEA's Supplemental Schedule. *See* Plaintiffs' Exhibit 2 at 84, 99. Coopers & Lybrand issued the following opinion letter with regard to NEA's Supplemental Schedule (emphasis added):

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[2] It is undisputed that the language used in this opinion letter was precisely that required by the established auditing standards. *See, e.g.*, Transcript of Evidentiary Hearing ("Transcript") at 155-56 (April 29, 1988) (testimony of OEA auditor Robert Birzer that there is no flexibility in the language that an auditor may use in expressing an opinion on audited statements); *id.* at 177 (testimony of NEA auditor Arthur Mann to the same effect). Even the expert witness called by petitioners conceded that the language in this opinion letter was "exactly as required" by the auditing standards. *Id.* at 104 (testimony David Hawkins).

> Our examination was made for the purpose of forming an opinion on the basic financial statements taken as a whole. The accompanying Schedules of Agency Fee Chargeable and Nonchargeable Expenditures were presented for purposes of additional analysis and are not a required part of the basic financial statements. *Such information has been subjected to the auditing procedures applied in the examination of the basic financial statements and, in our opinion, is fairly stated in all material respects in relation to the basic financial statements taken as a whole.*[3]

In short, the notice that OEA mailed to all nonmember employees on December 15, 1987 included, *inter alia*, the basic financial statements and supplemental schedules of chargeable and nonchargeable expenditures for the 1987-88 school year for both OEA and NEA, each of which was audited by independent certified public accounting firms in accordance with generally accepted accounting principles.[4]

B. *The Decision of the District Court.* Petitioners filed this lawsuit in the United States District Court for the Northern District of Ohio on December 30, 1987. In their complaint, petitioners alleged, *inter alia*, that OEA had violated their constitutional rights by failing to disclose adequate financial information prior to collecting fair share fees. The District Court held a one-day evidentiary hearing on April 29, 1988, during which the court heard conflicting testimony from experts retained by petitioners and by OEA with regard to the sufficiency

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[3] Again, the language used in this opinion letter was precisely that required by the applicable auditing standards. *See supra* note 2.

[4] The notice sent to nonmember employees on December 15, 1987 also included statements of chargeable expenditures for the relevant local association and, if applicable, the district education association. *See* Plaintiffs' Exhibit 2 at 113-14. The adequacy of these statements is not an issue before this Court.

of the audited financial information that OEA had distributed as part of its December 15 notice. After receiving post-hearing briefs, the court issued a Memorandum Opinion, including specific findings of fact and conclusions of law, and entered judgment for OEA on November 18, 1988.[5]

The sole question before the District Court was whether "the type of financial disclosure provided by [OEA was] sufficient under *Chicago Teachers Union v. Hudson*," App. at 13a, and more specifically whether OEA satisfied the "auditing" requirement set forth in footnote 18 of that opinion, 475 U.S. 292, 307 n.18 (1986). The court began its analysis by noting that "OEA's present financial disclosure [is] a Supplemental Schedule presented with the basic statement." App. at 14a. Such a format, the court found, is "regulated by [S]tatement of Auditing Standard No. 29," App. at 14a, one of numerous standards governing auditors that are issued periodically by the Auditing Standards Board of the American Institute of Certified Public Accountants. *See* Plaintiffs' Exhibit 4 (copy of Statement of Auditing Standard ("SAS") No. 29). In accordance with the express terms of SAS No. 29, an auditor is authorized to report "to his client or to others [using] a document that contains information in addition to the client's basic financial statements and the auditor's standard report thereon." *Id.* at 1.[6]

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[5] Although the December 15, 1987 notice included financial information about both OEA and NEA, and although evidence was presented at the April 29, 1988 hearing regarding the auditing procedures of both organizations, the decisions of the courts below dealt essentially with the adequacy of the OEA's audit of its own activities. In their Petition to this Court, petitioners likewise focus on OEA. It should be noted, however, that the auditing procedures of OEA and NEA are in all material respects identical, and that the conclusions reached by the courts below concerning the constitutional adequacy of those auditing procedures apply to both organizations.

[6] The information included in a Supplemental Schedule under SAS No. 29 may include "additional details or explanations of items

Based on the guidelines set forth in SAS No. 29, and the testimony at the evidentiary hearing, the District Court specifically found that "the SAS 29 Supplemental Schedule is a proper reporting mechanism for special subject matters such as the matter in this case." App. at 17a.[7] The court further found that "under a Supplemental Schedule presented with the basic statement, *the Supplemental Schedule is subjected to an independent audit.*" App. at 17a (emphasis added). In the case of OEA, this independent audit occurred in two distinct, albeit related, ways: first, the Supplemental Schedule was subjected to an independent audit "because the basic financial statements from which the Supplemental Schedule is derived, was subjected to detailed testing," App. at 17a & n.2 (the Supplemental Schedule "was derived from the detailed testing of the financial statements themselves"); and second, the Supplemental Schedule was subjected to an independent audit because "there was indirectly an independent analysis of whether the expenditures were actually made, [and] the auditors did supplemental checking on certain OEA accounts," App.

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in or related to the basic financial statements, consolidating information, historical summaries of items extracted from the basic financial statements, statistical data, and other material, some of which may be from sources outside the accounting system or outside the entity." Plaintiffs' Exhibit 4 at 2.

[7] In support of this finding, the court noted the testimony of OEA auditor Robert Birzer, who testified that "the use of a SAS 29 Supplemental Schedule is appropriate and often used for reporting special items such as material required by the Securities & Exchange Commission, the National Association of Securities Dealers, Regulations Broker Dealers, Federal Home Loan Bank Board, and the Department of Housing and Urban Development." App. at 17a (citing Transcript at 150). *See also* Transcript at 178-82 (testimony of NEA auditor Arthur Mann, describing use of Supplemental Schedules under SAS No. 29 for various business and governmental purposes, including reports for charitable organizations regulated by New York State and reports for retirement plans regulated by the Department of Labor).

at 17a n.2.[8] Based on these specific findings, the District Court concluded that "OEA's financial disclosure is adequate under the applicable case law." App. at 14a.

In reaching this conclusion, the District Court specifically rejected petitioners' claim that a Special Report

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[8] These findings of fact by the District Court were amply supported by the testimony presented by the OEA and NEA auditors during the evidentiary hearing. For example, when asked by the court how the auditors would discover an amount that was in the chargeable column that should be in the nonchargeable column, OEA auditor Robert Birzer testified as follows:

> WITNESS: We would [discover such an error] either through our detail testing, or we would make it through portions of our other audit procedures, which includes analytic review areas. For example, if we saw that the entire amount in governmental services for 1987 was in the chargeability caption, and no amount was nonchargeable, and in the prior years we had always discovered . . . significant amounts of nonchargeable expenditures, we would have investigated that and accounted for that on a satisfactory basis as to why there was no such amount in there this year.
>
> * * * *
>
> COURT: And how would your detailed testing have picked it up if, in fact, it did?
>
> WITNESS: We selected several accounts, several of the program areas, and looked at those reports that the client personnel prepared independent of the accounting department, and subjected them to several detailed tests.
>
> COURT: Such as?
>
> WITNESS: Such as looking at the time sheets for allocation of personnel looking at expenditures, invoices for monies spent, like spent to purchase T.V. time for a political candidate, or something in that particular area.

Transcript at 140-41. *See also, e.g., id.* at 125 ("We did additional testing back in the agency fee area as supplemental testing to primary testing that we had already done on the OEA accounts and records in performing our basic audit of the financial statements"); *id.* at 147 (primary testing of basic financial statement "wasn't primarily related to [the chargeability and nonchargeability calculations], but it included it, because . . . our audit planning memorandum . . . informed [our personnel] that this type of testing was being done in the course of the audit").

issued pursuant to Statement of Auditing Standard No. 14, as opposed to a Supplemental Schedule issued pursuant to SAS No. 29, is a constitutionally required part of OEA's financial disclosure. Although noting that "the level of assurance, and the level of detail is greater on an SAS 14 Special Report as opposed to a SAS 29 Supplemental Schedule," App. at 14a, and that "the level of materiality used by auditors under a SAS 14 Special Report is generally lower than that used on an SAS 29 Supplemental Schedule," App. at 17a, the court did not consider those differences determinative of the narrow issue presented in this case. Rather, the court found as fact, based on an admission by petitioners' own expert witness, that "the use of the SAS 14 Special Report would be of no more help in terms of increasing the number of those who understood the information," App. at 20a (citing Transcript at 28-29). This is because, regardless of whether OEA used a Special Report under SAS No. 14 or a Supplemental Schedule under SAS No. 29, the nature of the disclosure that was provided to nonmembers would "not . . . have been any different." Transcript at 156. *See id.* at 31-32 (petitioners' expert agreeing that there is "probably not a chance in the world" that the auditor's opinion would communicate a specific level of assurance to nonmember employees "[b]ecause this is a very technical language [and] you have to have a technician to understand it").

Accordingly, based on its express findings, the District Court concluded that "[OEA's] type of financial disclosure here . . . adequately discloses the financial position of the Union" and therefore "is adequate under *Hudson* and subsequent cases." App. at 19a, 22a. As the District Court put it, the overriding "purpose of the financial disclosure in the fair share fee process, prior to the nonmembers' opportunity to object, is to provide the nonmember with sufficient information so that [the] user can make an informed decision whether to object or not." App. at 18a (citing *Hudson*, 475 U.S. at 306). In

this case, the court reasoned, "[t]he users of the material . . . are education professionals with post-high school degrees and can fairly assess whether they want to object or not on the basis of the information disclosed to them." App. at 20a.

Finally, in an effort to place its holding with regard to the choice between a Supplemental Schedule under SAS No. 29 or a Special Report under SAS No. 14 in the proper context, the District Court addressed petitioners' underlying claim that OEA and its affiliates are required to adopt "the least restrictive means available for the Union to disclose its finances and in this case the means is the SAS 14 Special Report." App. at 20a-21a. The court rejected this argument. It agreed instead with the position taken by the United States Court of Appeals for the Second Circuit in *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987), quoting with approval the following paragraph from that decision:

> We do not believe that *Hudson* stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable. When the union's plan satisfies standards established by *Hudson*, the plan should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support.

App. at 21a. Indeed, the court noted, petitioners' attempt to compel OEA and its affiliates to use a Special Report under SAS No. 14 was just part of a larger "request that the Court order a litany of other requirements to be imposed upon the Union in its financial disclosure," including but not limited to "the appointment of an accounting expert as a Special Master for the purpose of temporarily overseeing the Union's engagement of their

auditors." App. at 21a-22a.[9] The District Court declined to take this or other "intrusive action" requested by petitioners. App. at 22a.

C. *The Decision of the Court of Appeals.* On appeal to the Sixth Circuit, petitioners again argued that this Court's decision in *Hudson* expressed a constitutional requirement that OEA provide its nonmember employees with a Special Report prepared pursuant to SAS No. 14 rather than a Supplemental Schedule under SAS No. 29. The Court of Appeals rejected this argument, and instead affirmed the District Court's conclusion that OEA's "disclosure of financial information to [petitioners] is constitutionally sufficient." App. 4a.

In particular, the Court of Appeals stated that, under this Court's decision in *Hudson*, "a union must adequately explain the basis for a fair share fee and that 'adequate' financial disclosure to nonunion members would include the major categories of expenses and verification by an independent auditor." App. at 6a-7a (citing 475 U.S. at 307 n.18) In this case, the court noted, OEA had "furnished [petitioners] with the budgets, audited financial statements and audited Supplemental Schedules of the Ohio Education Association and the National Education Association." App. at 6a. Moreover, the Court of Appeals noted, the District Court had "*specifically found* that: (1) the Auditing Standard No. 29 Supplemental Schedule was a proper reporting mechanism for special subject matters such as the matter in this case, and (2) the Auditing Standard No. 29 Supplemental Schedule was subjected to an independent audit." App. at 6a (emphasis added). Based on these findings by the District Court, which the Court of Appeals expressly upheld as not being "clearly erroneous," App. at 6a & n.2, the appellate court concluded "that the type

[9] The entire "litany" of requirements sought by the petitioners before the District Court is catalogued in that court's opinion. *See* App. at 21a-22a.

of financial disclosure provided by the Ohio Education Association meets the requirements of *Hudson*." App. at 6a. As the Court of Appeals expressly stated, App. at 7a:

> The Ohio Education Association's financial disclosure is clearly adequate under *Hudson* because the Association disclosed its various types of chargeable and nonchargeable expenditures to [petitioners] in a timely manner and because, as the district court specifically found, the Association's financial statements and its Supplemental Schedule were subjected to verification by an independent auditor.

The Court of Appeals also rejected petitioners' assertion that OEA's financial disclosure was inadequate because "the Association did not employ the 'least restrictive' procedure imaginable to collect the fair share fees." App. at 7a. Specifically, the court concluded that "*Hudson* does not support this argument," reasoning as follows:

> *Hudson* stated that nonunion member employees must be given information "sufficient" to determine the propriety of the union's fair share fee, but specifically noted that the union need not provide nonmember employees with an exhaustive and detailed list of all its expenditures and that "absolute precision" in the union's calculation of the fair share fees was not expected or required. 475 U.S. at 306, 307 n.18. . . . Thus, *Hudson* does not mandate a union to utilize the *most* detailed and effective service available to audit the financial information disclosed to nonmember employees. . . . [T]he mere fact that a Special Report [under SAS No. 14] would provide "better" or more detailed financial information does not make provision of a Special Report by the union constitutionally required. *Hudson* only requires that a union's procedures for collection of fair share fees provide "adequate" or "sufficient" financial disclosure so that nonmember employees such as [petitioners]

> may "gauge the propriety of the union's fee." 475 U.S. at 306.

App. at 7a-8a (emphasis in original).

Finally, the court rejected petitioners' assertion that affirmance of the District Court decision in this case would be inconsistent with the prior decisions of the Sixth Circuit in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), and *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). Those cases, the court noted, "did not extend the analysis of *Hudson* or set any additional or more stringent standards that a union must meet in disclosing financial information to nonmember employees." App. at 8a-9a. To the contrary, "because the financial disclosures [made by OEA] satisfy the constitutional requirements of *Hudson*, the disclosures are also constitutionally sufficient under *Damiano* and *Tierney*." App. at 9a. The court further noted that its decision in this case was "in accord with the recent holdings of other circuits on the issue of financial disclosures to nonunion member employees." App. at 9a (citing *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987), and *Ping v. National Education Association*, 870 F.2d 1369 (7th Cir. 1989)).

Petitioners' request for rehearing and suggestion for rehearing *en banc* were denied by the Court of Appeals.

REASONS FOR DENYING THE WRIT

The sole issue decided by the courts below was one unique to the evidentiary record in this case, *viz.*, whether the notice that OEA sent to nonmember employees on December 15, 1987, which included Supplemental Schedules of chargeable and nonchargeable expenditures for both OEA and NEA, each of which was independently audited by a well-respected certified public accounting firm pursuant to Statement of Auditing Standard No. 29, satisfied the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to

"verification by an independent auditor." Before ruling on this issue, the District Court made specific findings of fact that were accepted as not clearly erroneous by the Court of Appeals. *See* App. 6a & n.2, 17a. Most notably, those findings were (1) that a Supplemental Schedule under SAS No. 29 is recognized by the accounting profession as a proper reporting mechanism for special subject matters such as the calculation of chargeable and nonchargeable expenditures at issue here, App. at 6a, 17a, and (2) that the Supplemental Schedules for OEA and NEA that were included in OEA's notice to nonmember employees in this case were "subjected to an independent audit," App. 6a, 17a. Based on these findings, the courts below concluded that the December 15 notice provided petitioners with adequate and sufficient financial information on which to decide whether to object to the amount of the fair share fee.

Although couching their argument in other terms, petitioners' submission to this Court represents nothing more than an attempt to reargue the factual questions decided below. Thus, petitioners devote almost five pages of their Petition to a "Summary of the Expert Testimony," Petition at 5-9, and provide this Court with a lengthy description of "what auditors are permitted to do, and actually do, under Generally Accepted Auditing Standards," Petition at 14-16. But petitioners either mischaracterize or completely ignore the determinative factual findings of the courts below. For example, petitioners state that "OEA's agency fee 'supplemental schedules' . . . were not subjected to a separate and specific audit," Petition at 7, even though the District Court expressly found as fact that the "Supplemental Schedule is subjected to an independent audit," App. at 17a, and even though the Court of Appeals expressly upheld that factual finding. App. at 6a. Similarly, petitioners contend that OEA's financial disclosure fell short because "the auditor must be engaged . . . specifically to audit the union's calculations . . . of what is chargeable and

what is not," Petition at 15, even though the courts below expressly found that the auditors in this case already have performed that task by verifying the OEA and NEA Supplemental Schedules that "se[t] forth th[ose] expenditures . . . that were chargeable to nonmember employees and those expenditures that were not chargeable to nonmembers," App. at 2a, 7a. The examples could continue, but there is no reason to belabor the point: although petitioners obviously disagree with the factual findings of the courts below, that disagreement does not warrant review by this Court.

We believe that the foregoing provides a dispositive response to the Petition. Nonetheless, in the interests of completeness, we will briefly address the two legal grounds which petitioners assert in support of their request for review.

I. First, petitioners argue that the Court of Appeals failed to apply the "traditional 'least restrictive means' test" when determining the adequacy of OEA's financial disclosure, and therefore erred by not requiring OEA to "engage its auditors to perform at the highest available level of audit service." Petition at 10-17. However, other than a string citation of cases that was included in the *Hudson* opinion simply to support the proposition that procedures affecting First Amendment rights generally must be "carefully tailored to minimize the infringement" of such rights, *see* 475 U.S. at 303 n.11, petitioners have pointed to nothing in this Court's decision in *Hudson*, or in any other decision, that requires OEA to meet such a standard.

In *Hudson*, this Court recognized that the collection of fair share fees has the potential for infringing on the First Amendment rights of nonmember employees, and therefore concluded that an exclusive representative must meet certain procedural requirements when collecting such fees, including the obligation to provide all nonmember employees with "*an adequate explanation* of the

basis for the fee." 475 U.S. at 310 (emphasis added). *See also id.* at 306 (nonmembers must "be given sufficient information to gauge the propriety of the union's fee"); *id.* (it is inadequate to "leav[e] the nonunion employees in the dark about the source of the figure for the agency fee").

The Court also offered some guidance in *Hudson* with regard to the specific information that unions must distribute to nonmember employees to meet this requirement. The Court first stated that a union must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. In subsequent footnotes, the Court elaborated on this general standard, first characterizing the union's obligation to provide information to nonmember employees as a "limited notice requirement" that should not impose an 'undue burden" on the union, *id.* at 306 n.17, and then stating that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," *id.* at 307 n.18. *See id.* (there necessarily exist "practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required' ") (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and *Abood v. Detroit Board of Education*, 431 U.S. 209, 239-40 n.40 (1977)). Finally, and of particular relevance here, the Court noted that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18.

While establishing a framework for protecting the constitutional rights of nonmember employees, the decision in *Hudson* does not indicate—and the rationale of the Court does not in any way suggest—that unions operating within this framework must utilize the best possible procedures available. The clear holding of the Court in

Hudson, repeatedly stated at numerous points in that decision, was only that unions must include in their notice "*an adequate explanation* of the basis for the fee" that would provide nonmember employees with "*sufficient* information to gauge the propriety of the union's fee." *See, e.g.*, 475 U.S. at 306, 307 n.18, 310 (emphasis added).

Indeed, the "least restrictive" standard proposed by petitioners in this case is incompatible with several specific holdings of this Court in *Hudson*. Thus, the decision in *Hudson* expressly allows unions to calculate the amount of their fair share fee with less than absolute precision, 475 U.S. at 307 n.18, to collect fees without a predeprivation hearing, *id.* at 309, 310, to provide expeditious arbitrations with less than full evidentiary safeguards, *id.* at 308 n.21, and to escrow less than 100% of the fee paid by nonmember employees while challenges to the fee are pending, *id.* at 310. In these and other areas, this Court plainly refused to impose on unions various procedures that would be "less restrictive" of First Amendment interests, and instead chose to consider the practical burdens that such procedures would impose.

The standard proposed by petitioners is, moreover, flatly inconsistent with the balancing approach that has been established by a long line of decisions of this Court in the context of fair share fees, including the Court's opinion in *Hudson* itself. In these decisions, the Court repeatedly has emphasized that unions also have a legitimate and important interest at stake: the right to eliminate free-riders by collecting and expending an objecting nonmember's fee for expenditures that are related to chargeable activities. In recognition of that interest, the Court has cautioned against overbroad remedies that "encroach[] on the legitimate activities or necessary functions of the union," *Machinists v. Street*, 367 U.S. 740, 774 (1961), and has approved only those remedies

protective of objectors' rights that are carefully tailored "lest the important functions of labor organizations . . . be unduly impaired," *Railway Clerks v. Allen*, 373 U.S. 113, 120 (1963). The Court in *Hudson* re-emphasized this need to accommodate competing interests when it stated:

> [T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*

475 U.S. at 302 (citations omitted) (emphasis added). By insisting that OEA must adopt the "least restrictive" means of collecting fair share fees, petitioners completely ignore this latter directive.

In short, the courts below correctly concluded that, to meet constitutional standards, the financial disclosure in this case did not have to incorporate the highest levels of audit service, but rather only had to satisfy the standard set forth in *Hudson*—*i.e.*, that a union must provide nonmembers with "an adequate explanation" of the fair share fee that includes "the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18, 310. The notice distributed by OEA on December 15, 1987—which for both OEA and NEA included Supplemental Schedules listing the major categories of expenditures that were verified by independent auditors in accordance with generally accepted accounting principles—easily met this standard.

II. Petitioners also contend that this Court should review the decision of the Court of Appeals because "the lower courts are chaotic in interpreting what this Court meant when it required a union's agency fee calculations to be 'verifi[ed] by an independent auditor.'" Petition at 17-21. Far from being in a state of chaos, however, the courts of appeals that have addressed the issue have unanimously endorsed the position taken by the court be-

low, and no federal or state court has taken a position to the contrary.

To begin with, as petitioners themselves concede, Petition at 13, 15, the decision below is fully consistent with decisions from the Second and Seventh Circuits, which are the only other federal appellate courts to have addressed the adequacy of audited financial information distributed by unions to their nonmember employees. Indeed, both *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987), and *Ping v. National Education Association*, 870 F.2d 1369 (7th Cir. 1989), were cited by the Court of Appeals in this case to demonstrate that its holding was "in accord with the recent holdings of other circuits." App. at 9a.

Petitioners assert that there is an internal conflict among decisions of the Sixth Circuit, Petition at 17-18, but that assertion is patently frivolous. Even assuming for the sake of argument that an *intra*-circuit conflict would provide a basis for this Court's review of the decision below, the Court of Appeals in this case expressly rejected petitioners' interpretation of its prior decisions in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), and *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). Instead, the court stated that *Damiano* and *Tierney* had "merely recited and then applied the standards in *Hudson*," App. at 8a, and "because the financial disclosures of [OEA] satisfy the constitutional requirements of *Hudson*, the disclosures are also constitutionally sufficient under *Damiano* and *Tierney*." App. at 9a.[10]

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[10] Indeed, petitioners' attempt to identify a "conflict" among decisions of the Sixth Circuit was the focus of their petition for rehearing and suggestion for rehearing *en banc* before the Court of Appeals. That petition was unanimously rejected on November 28, 1989. App. 11a-12a. *See also Lehnert v. Ferris Faculty Association-MEA-NEA*, 893 F.2d 111, 112 (6th Cir. 1989), *petition for cert. filed sum nom.*, 58 U.S.L.W. —— (U.S. March 8, 1990) (No. 89-1415) (subsequent decision of the Sixth Circuit expressly noting that "[u]pon suggestion that *Gwirtz* was inconsistent with *Tierney*

Finally, petitioners point to the recent decision in *Hohe v. Casey*, 727 F. Supp. 163 (M.D. Pa. 1989), as creating a conflict among the lower federal courts. Although the District Court in *Hohe* concluded that the unions involved in that case had not provided nonmember employees with adequate financial information, the court's holding was expressly limited to accounting reports prepared pursuant to SAS No. 35, which is a completely different auditing standard than SAS No. 29 that governed the Supplemental Schedules involved in the instant case. *See* Petition at 19 (acknowledgment by petitioners that "the accounting disclosed in this case used a different format than that in *Hohe*"). Indeed, the court in *Hohe* specifically distinguished the information provided to nonmember employees in that case from the unique facts of this case, stating the point as follows: "Defendants' reliance upon [*Gwirtz*] is misplaced. In *Gwirtz*, the union had audited the breakdown of chargeable and non-chargeable expenses under SAS No. 29 standards. The breakdown [here] was pursuant to SAS No. 35 standards." 727 F. Supp. at 166. Thus, even the District Court in *Hohe* recognized that its decision was not in conflict with the decision of the Court of Appeals in this case.

In short, petitioners have not identified any conflict among lower court decisions that might warrant this Court's review.

. . ., the court considered a petition for rehearing en banc and declined to rehear *Gwirtz*").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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